

IOWA DEPARTMENT OF NATURAL RESOURCES

ADMINISTRATIVE CONSENT ORDER

IN THE MATTER OF:

AIR ADVANTAGE, INC.

**ADMINISTRATIVE
CONSENT ORDER**

2012-WW- 20

TO: Steve Hohl
Air Advantage, Inc.
803 Pine Street
Donnellson, IA 52625

Kevin Reynolds
Whitfield & Eddy P.L.C.
317 Sixth Avenue, Ste 1200
Des Moines, IA 50309

John Newton
Air Advantage, Inc.
1720 S. Lexington Ave.
Mt. Pleasant, IA 52641

I. SUMMARY

The Iowa Department of Natural Resources (Department) and Air Advantage, Inc. (Air Advantage) hereby agree to the following Administrative Consent Order (Order). Air Advantage agrees to pay an administrative penalty of \$7,500.00 and restitution of \$2,940.00 to the Department. See Sections IV and V for more details.

Any questions regarding this Order should be directed to:

Relating to technical requirements:

Aaron Pickens
Iowa Department of Natural Resources
1023 W. Madison
Washington, IA 52353
Ph: 319/653-2135

Relating to legal requirements:

Aaron Brees, Attorney
Iowa Department of Natural Resources
Des Moines, Iowa 50319-0034
Ph: 515/281-5965
aaron.brees@dnr.iowa.gov

Payment of penalty to:

Director of the Iowa DNR
Wallace State Office Building
502 East Ninth Street
Des Moines, Iowa 503219-0034

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AIR ADVANTAGE, INC.
II. JURISDICTION

This Order is issued pursuant to Iowa Code section 455B.175(1), which authorizes the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code chapter 455B, Division III, Part I (water quality) and the rules promulgated or permits issued pursuant thereto, and Iowa Code section 455B.109 and administrative rules in 567 Iowa Administrative Code (I.A.C.) chapter 10, which authorize the Director to assess administrative penalties up to \$10,000.

III. STATEMENT OF FACTS

The Department and Air Advantage hereby agree to the following statement of facts:

1. Air Advantage is a Mt. Pleasant, Iowa based business that provides various aircraft related services. Among these services is the aerial application of agricultural chemicals such as pesticides. Steve Hohl is the former owner of Air Advantage. Mr. Hohl sold the business on or about December 31, 2010. The events in question occurred when Mr. Hohl owned the business.

2. At approximately 5:45pm on July 13, 2010, William "Bill" Totemeier reported a complaint of improper pesticide application to the Department via the 24 hour emergency line. This complaint was filed against Dan Gabeline and Air Advantage.

3. At approximately 8:15pm on July 13, 2010, Aaron Pickens, environmental specialist with Department Field Office #6 (FO6), arrived at Mr. Totemeier's residence at 17654 Des Moines Henry Avenue, located northeast of New London, Iowa. Mr. Totemeier stated that on the evening of July 13, 2010, he witnessed a yellow airplane spraying his neighbor's cornfields that he identified as belonging to Dan Gabeline. Mr. Totemeier said that he witnessed chemical drift from the airplane onto his pasture, hay ground, and cornfield as well as another neighbor's property. Mr. Totemeier also suspected that the creek running through the Gabeline farm (Flint Creek) had been impacted. Mr. Totemeier stated that he had photographed the yellow airplane spraying his neighbor's fields.

4. After meeting with Mr. Totemeier, Mr. Pickens made visual observations and collected water samples for analysis by the State Hygienic Lab. The following is a summary of observations and water sample locations taken the evening of July 13, 2010:

- SW Branch of Upper Flint Creek – located upstream of the application area. No chemical odors were detected in the air. No signs of aquatic stress were noted.
- 180th Street East Tributary of Flint Creek – located downstream of the application area. A slight chemical odor was detected in the air. No aquatic stress was observed.
- 180th Street Main Flint Creek – located downstream of the application area. A slight chemical odor was detected in the air. No aquatic stress was observed.

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- Low Water Crossing in Gabeline's Field on Main Flint Creek – located in the field in which the application occurred. Pickens detected a strong odor of chemicals in the air. Pickens observed several dead crayfish on the stream bed. The crayfish still maintained good color and appeared fresh indicating a recent kill. No fish were observed dead or alive.
- 220th Street Culvert on Main Flint Creek – located downstream of the Low Water Crossing site. Pickens detected a slight chemical odor in the air. No aquatic stress was observed.

5. On July 14, 2010, Jim Kacer, a Department environmental specialist, and Mr. Pickens resumed the investigation. Mr. Pickens and Mr. Kacer revisited the five sites where samples were collected the previous evening. No changes or additional discoveries were noted. Dead crayfish were still visible at the low water crossing location and were photographed for documentation. See Attachment 1. Visual observations were made and water samples were collected for analysis at the State Hygienic Lab from two additional upstream locations:

- Confluence of SW Flint Creek and Tributary North of Cemetery – located upstream of the application area. No odors were detected and no aquatic stress was observed.
- 240th Street Culvert – located upstream of the application area on the main branch of Flint Creek. No chemical odors were detected in the air and no aquatic stress was observed.

A map showing the locations of water sample sites is included as Attachment 2.

6. At approximately 1:00pm on July 14, 2010, Mr. Kacer and Mr. Pickens arrived at the Mount Pleasant Airport to discuss the incident with Air Advantage personnel. Mr. Pickens and Mr. Kacer spoke with then owner, Steve Hohl, and office assistant Toni Baker. Bob Mikota, an IDALS Pesticide Investigator, was also onsite conducting an investigation into the incident. The following facts were obtained from Air Advantage:

- Air Advantage did aerially apply pesticides to property owned or operated by Mr. Gabeline on the evening of July 13, 2010. A map of the application area was provided and is included as Attachment 3.
- The pesticide applied on a per acre basis was a mix of 6 oz. Headline (pyraclostrobin), 8 oz. Cobalt (chlorpyrifos), and 2 gallons water.
- Don Rose was the pilot who applied the pesticide. Mr. Rose was an independent contractor, or subcontractor hired by Air Advantage to do the work. Mr. Rose is an Iowa licensed commercial applicator.
- A semi-truck and tanker were observed at the airport. Mr. Hohl indicated that Mr. Gabeline brought the mixed loads to the airport.

7. At approximately 3:00pm, Mr. Pickens received a call from Mr. Gabeline. Mr. Pickens and Mr. Gabeline discussed the nature of the complaint and initial observations. Mr. Gabeline was notified that water samples were collected and would be analyzed for concentrations of the pesticides applied. Mr. Gabeline confirmed that the pesticides applied were Headline and Cobalt.

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8. On July 15, 2010, Mr. Pickens delivered the water samples collected on July 13 and 14, 2010 to the State Hygienic Lab in Oakdale. On July 23, 2010, FO6 received a lab analysis report from the State Hygienic Lab for these water samples. The results indicated that the active ingredient in Cobalt (chlorpyrifos) and/or Headline (pyraclostrobin) was present in samples identified as 240th St. Upstream Culvert, 180th St. East Tributary Flint Creek, Low Water Crossing Flint Creek Gabeline's Farm, and 220th St. Culvert Main Flint Creek. The level of chlorpyrifos in these samples exceeded the statewide surface water quality standards identified in Table 1: Criteria for Chemical Constituents, found at 567 I.A.C. 61.3. There is no statewide standard for pyraclostrobin. A map displaying all lab results in relation to the sample sites is included as Attachment 4.

9. On February 4, 2011, Air Advantage and Mr. Gabeline were sent a Notice of Violation letter explaining the findings of the investigation and stating the provisions of law that had been violated.

IV. CONCLUSIONS OF LAW

The parties hereby agree that the following conclusions of law are applicable to this matter:

1. Iowa Code section 455B.186(1) and 567 I.A.C. 62.1(1) prohibit the discharge of "a pollutant" into "a water of the state" unless it is released pursuant to a valid permit issued by the Director.
2. A "pollutant" is defined in Iowa Code section 455B.171(18) as "sewage, industrial waste, or other waste." Restricted use agricultural chemicals such as Headline and Cobalt may be pollutants when misapplied.
3. Flint Creek and its associated tributaries are "waters of the state" pursuant to Iowa Code section 455B.171(37) which defines the term to include "any stream,...watercourse, waterway,...drainage system, and any other body or accumulation of water...natural or artificial, public or private, which are contained within...the state..."
4. As Air Advantage did not have a permit authorizing the discharge of Headline or Cobalt to these waters, it has discharged a pollutant into a water of the state in violation of the above provisions.
5. Iowa Code section 455B.173 states that the Environmental Protection Commission (EPC) shall develop water quality standards which shall, at a minimum, maintain the existing quality of the water of the state. The EPC has done so in 567 I.A.C. chapter 61.
6. 567 I.A.C. 61.3(2) states that all surface waters of the State "shall be free from substances attributable to wastewater discharges or agricultural practices...which are acutely toxic to human, animal, or plant life." The evidence suggests that Air Advantage's discharge caused the death of crayfish in Flint Creek in violation of this

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provision. No fish kill, or live fish, were observed in Flint Creek at the time of the Department's investigation.

7. 567 IAC 61.3(3)(b)(3) provides specific water quality criteria and specifies that waters designated Class "B", such as Flint Creek, shall be protected for aquatic life. The specific criteria for chlorpyrifos are 0.083 uf/L for acute exposure and 0.041 for chronic exposure. Lab analysis of water samples from three locations in Flint Creek found chlorpyrifos levels that exceeded the acute numeric criterion, indicating a violation of this provision.

8. Iowa Code section 481A.151 states that any person who is liable for polluting water of the state in violation of state law shall be required to pay restitution for any resulting injury to wild animals and the cost of the Department's investigation. This section authorizes the Natural Resource Commission (NRC) to adopt rules applicable to the method of calculating restitution assessments and authorizes the Department to recover these assessments through Iowa Code chapter 17A contested case procedures. The NRC has adopted such rules in 571 I.A.C. 113.

9. Based on the authority provided by and methods specified in 571 I.A.C. 113 the Department is authorized to collect, and Air Advantage is liable for the following:

Aquatic life restitution	The Department elects not to assess a restitution value for the purpose of resolving this matter.
Field Services investigation costs	\$2,940.00

V. ORDER

THEREFORE, the Department hereby orders and Air Advantage agrees to the following:

1. Air Advantage shall pay an administrative penalty of \$7,500.00 to the order of the Iowa Department of Natural Resources in accordance with the following schedule:

\$1,500.00	April 1, 2013 (Initial payment)
\$1,500.00	September 1, 2013
\$1,500.00	April 1, 2014
\$1,500.00	September 1, 2014
\$1,500.00	April 1, 2015 (Final payment)

2. Air Advantage shall pay restitution of \$2,940.00 to the order of the Iowa Department of Natural Resources within 30 days of receipt of this Order.

VI. PENALTY

1. Iowa Code section 455B.191 authorizes the assessment of civil penalties in Iowa District Court of up to \$5,000 per day of violation for the violations involved in this matter. More serious criminal sanctions are also available pursuant to that provision. Additionally, Iowa Code section 455B.109 authorizes the EPC to establish by rule a

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schedule of civil penalties up to \$10,000 which may be assessed administratively. The EPC has adopted this schedule with procedures and criteria for assessment of penalties in 567 I.A.C. chapter 10.

ECONOMIC BENEFIT: No penalty is assessed for this factor.

GRAVITY: An illegal discharge resulting in loss of aquatic life is a serious violation that involves actual harm to the environment. Therefore, \$3,000.00 is assessed for this factor.

CULPABILITY: Air Advantage has a duty to know the regulations that are applicable to its business. Due to its involvement with the Department during the previous two years in which very similar violations occurred, it is not plausible that Air Advantage was unaware of the law in this instance. Air Advantage knew that it could not directly spray pesticides over the creek or allow them to drift into the creek. Air Advantage knew that doing so was a serious violation that could result in fish kills or loss of other aquatic life. Despite this knowledge, Air Advantage failed to conduct its aerial application in a manner that would avoid these outcomes. Therefore, \$3,500.00 is assessed for this factor.

AGGRAVATING FACTORS: The violations contained in this Order represent the third consecutive year that Air Advantage has been involved in misapplication of pesticides at Mr. Gabeline's farms. The prior two instances resulted in substantial fish kills. In the first year, 2008, the Department did not take official enforcement action, choosing to handle a first offense through a settlement that included payment of restitution for the fish kill at a greatly reduced amount. In 2009, following the second violation and resulting fish kill, the Department entered into a consent order with Air Advantage and its subcontractor that included an \$8,500 penalty and payment of restitution for the fish kill. It is apparent that these actions by the Department have been insufficient to ensure that Air Advantage will take compliance seriously. The repeat nature of the violations, all resulting in actual harm to the environment in the form of significant fish kills and loss of other aquatic life, is an aggravating factor for which \$1,000 is assessed. The DNR acknowledges that then owner Steve Hohl was not actually piloting the aircraft that were involved in any of these incidents.

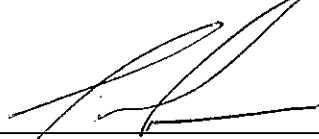
The total penalty calculation is \$7,500.00.

VII. WAIVER OF APPEAL RIGHTS

Iowa Code sections 455B.175 and 481A.151, and 561 I.A.C. 7.4(1), as adopted by reference by 567 I.A.C. chapter 7 and 571 I.A.C. chapter 7, authorize a written notice of appeal to the EPC and NRC, respectively. This Order is entered into knowingly by and with the consent of Air Advantage. By signing this Order all rights to appeal this Order are waived.


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VIII. NONCOMPLIANCE

Compliance with Section V of this Order constitutes full satisfaction of all requirements pertaining to the violations described in this Order. Failure to comply with this Order may result in the imposition of administrative penalties pursuant to an administrative order or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.175.



AIR ADVANTAGE, INC.

Dated this 6 day of August, 2012



CHUCK GIPP, DIRECTOR

IOWA DEPARTMENT OF NATURAL RESOURCES

Dated this 16th day of August, 2012

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ATTACHMENT 1



Figure 1. Dead crayfish, Flint Creek, July 14, 2010.

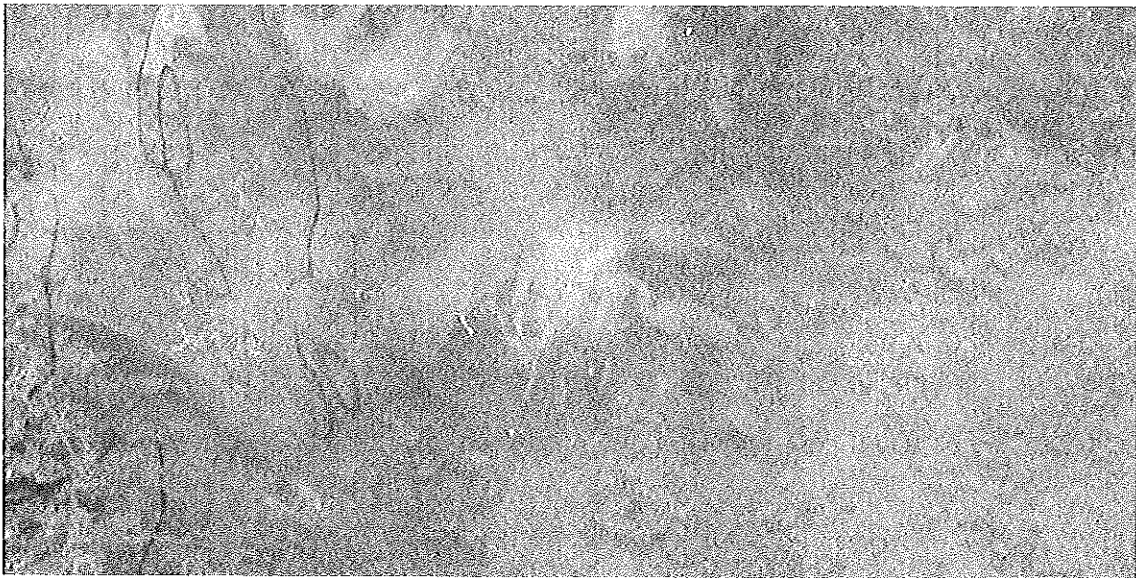


Figure 2. Dead crayfish, Flint Creek, July 14, 2010.

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ATTACHMENT 1 continued

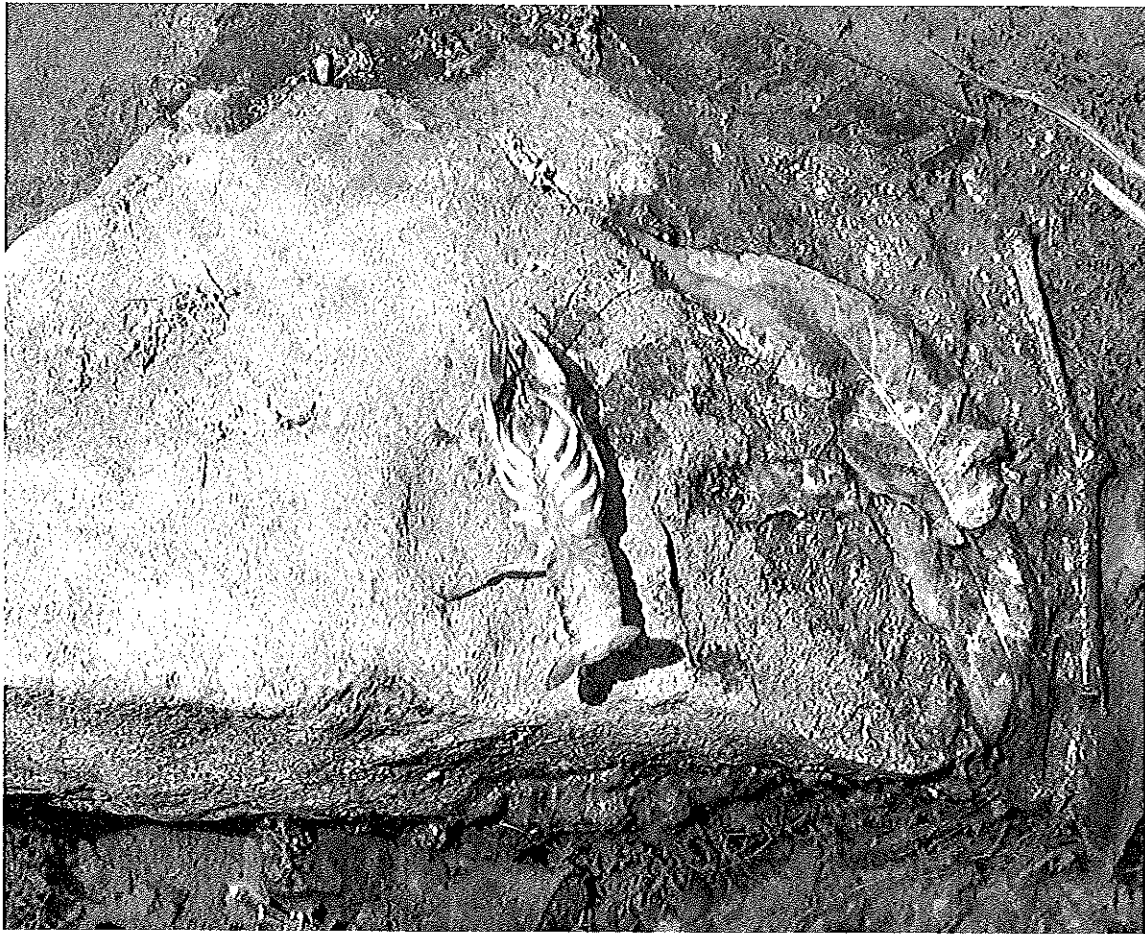
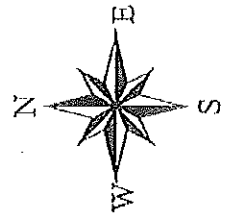
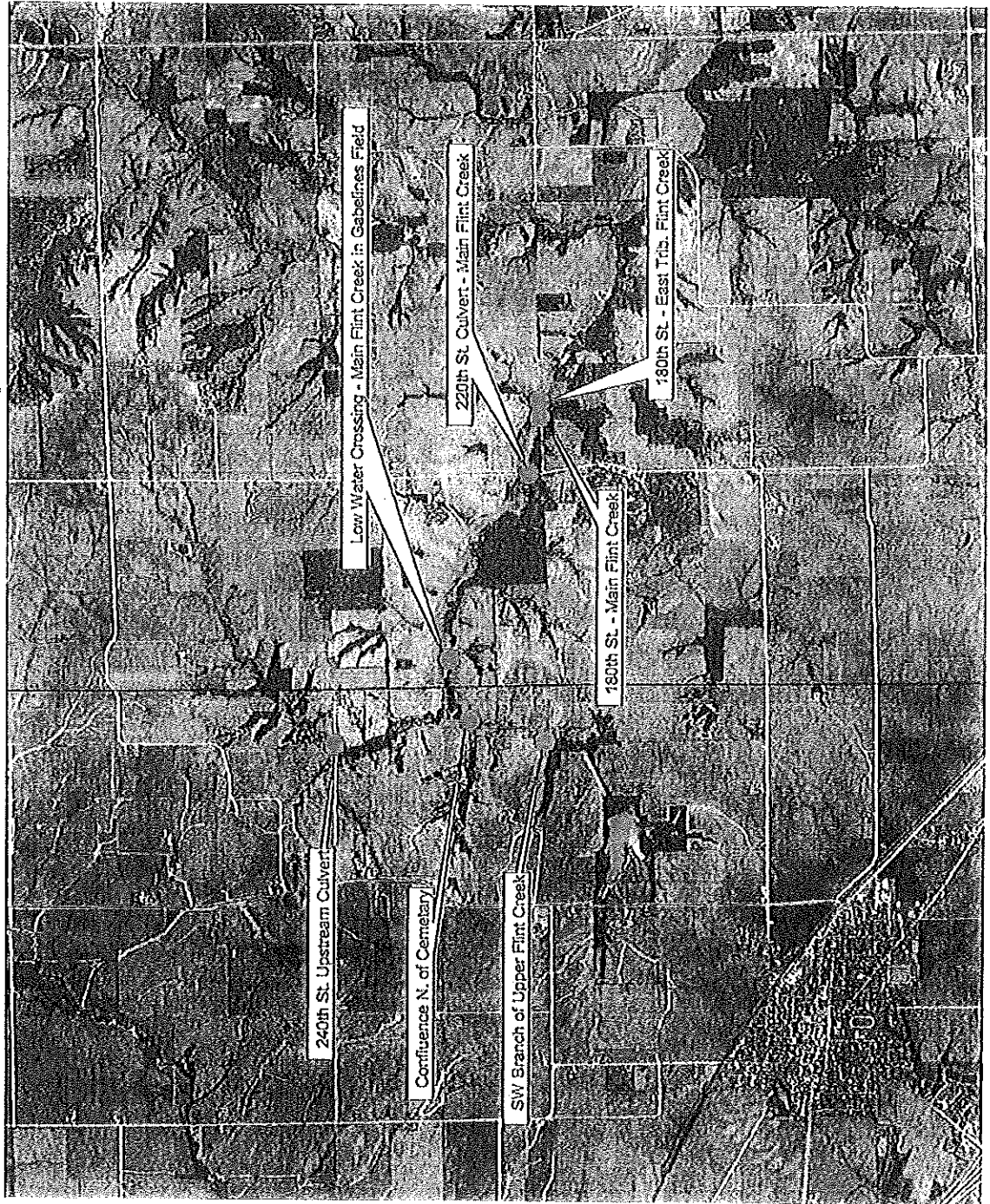


Figure 3. Dead crayfish, Flint Creek, July 14, 2010.

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ATTACHMENT 2



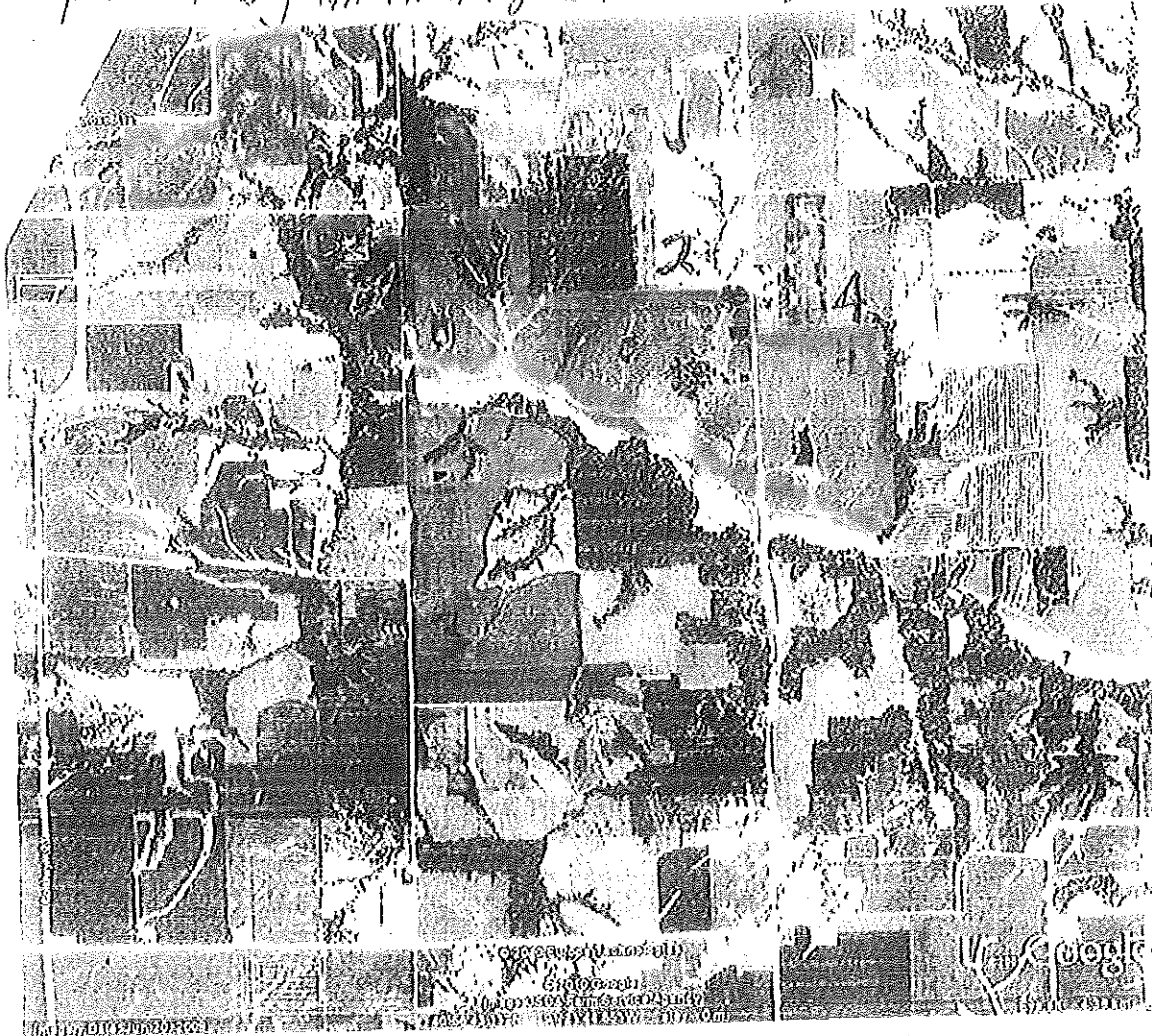
Totermeier Aerial Spray Complaint
Surface Water Sampling Sites
Collected by A. Pickens on July 13 & 14, 2010



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Approved By Air Advantage Inc.

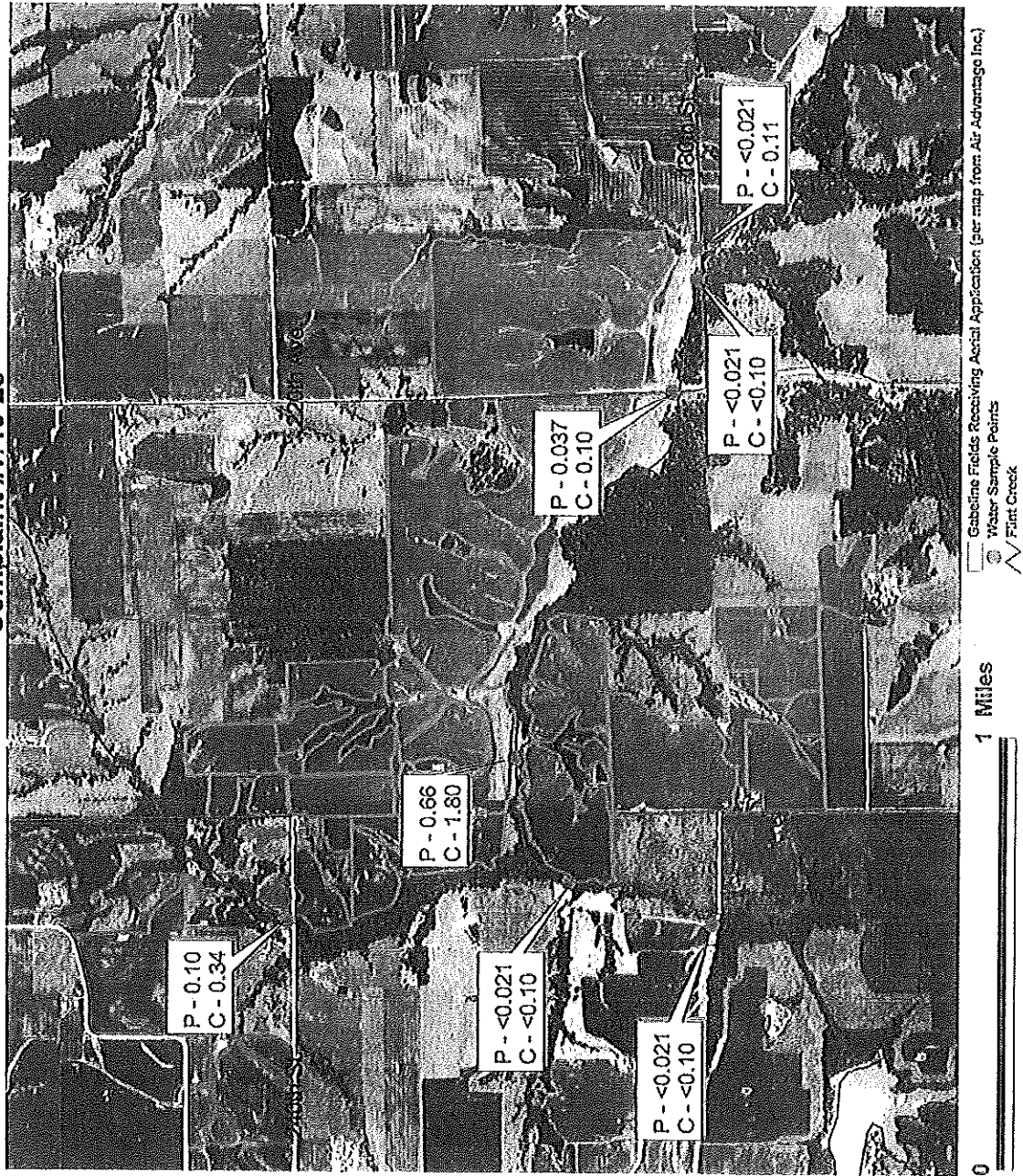
2010



2010
8/10/10
11/10/10

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Gabeline Farms / Air Advantage Aerial Spray Investigation
Complaint #7/10-23



P = Pyraclostrobin
C = Chlorpyrifos
Note: All values
expressed
in ug/L